93-741

No.

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THADDEUS KOSTRUBALA, M.D.
Petitioner,
v.
ESTATE OF CONNERS, HOWARD MEREDITH, et al.
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a voluntarily-committed patient at a State mental hospital have a Federal constitutional due process right to adequate security, as opposed to rights protected under state tort law?

2. For purposes of § 1983 liability, can a State hospital administrator be deemed the proximate cause of one patient's killing of another patient, premised solely upon the administrator's failure to investigate and intervene to prevent the assault?

3. Is summary reversal of the Ninth Circuit's decision on attorney's fees warranted, given its substitution of an any -"substantial" result standard for the comparative test of fee reasonableness mandated by this Court's opinion in *Farrar v. Hobby*, 121 L.Ed.2d 505 (1993)?

LIST OF PARTIES

Petitioner: Thaddeus Kostrubala, M.D.
Respondents: Estate of Conners, Howard Meredith, Lillian Beatty.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTIONAL GROUNDS 2

APPLICABLE FEDERAL LAWS 2

STATEMENT OF THE CASE 3

1. Nature of this Controversy. 3
2. Proceedings Below. 6
3. Reasons for Granting of this Petition. 7

ARGUMENT 8

I REVIEW OF THIS CASE IS NEEDED TO RESOLVE AN IMPORTANT AND HERETOFORE UNRESOLVED ISSUE - WHETHER THE STATES HAVE A CONSTITUTIONAL DUTY TO PROTECT VOLUNTARY PATIENTS AT INSTITUTIONS 8

II THE CONCLUSION THAT PETITIONER'S INACTION CONSTITUTED A DUE PROCESS DEPRIVATION CANNOT BE SQUARED WITH THIS COURT'S PROXIMATE CAUSE ANALYSIS IN *MARTINEZ v. CALIFORNIA* 12

III THE DECISION OF THE NINTH CIRCUIT ON FEES IS FUNDAMENTALLY INCONSISTENT WITH THE DECISION OF THIS COURT IN *FARRAR v. HOBBY* 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Baker v. McCollan
443 U.S. 137, 142 (1979) 15

Brenneman v. State
(1989) 208 Cal.App.3d 812 13

DeShaney v. Winnebago County Dept. of Social Services
489 U.S. 189 (1989) 7, 8, 9-11

Farrar v. Hobby
506 U.S. , 121 L.Ed.2d 494 (1992) 16, 17, 19

Fialkowski v. Greenwich Home for Children, Inc.
921 F.2d 459, 465 (3d Cir. 1990) 10

Hensley v. Eckerhardt
461 U.S. 424, 436 (1983) 17

Jordan v. State of Tenn.
738 F.Supp. 258 (M.D. Tenn. 1990) 10

Martinez v. California
444 U.S. 277 (1980) 7, 12, 14, 15

Monahan v. Dorchester Counseling Center, Inc.
961 F.2d 987 (1st Cir. 1992) 10

Monroe v. Pape
365 U.S. 167, 187 (1961) 13

Ridler v. Four County Counseling Center,
809 F.Supp. 1343 (N.D. Ind. 1992) 10

Riverside v. Rivera,
477 U.S. 561, 593 (1986) 17, 18

Society for Goodwill to Retarded Children v. Cuomo
737 F.2d 1239, 1245-46 (2d Cir. 1984),
cert. denied, 107 L.Ed.2d 835 (1990) 10

State v. Superior Court (Perry)
(1984) 150 Cal.App.3d 848 13

Stoneking v. Bradford Area School District
882 F.2d 720 (3d Cir. 1989) 10

Whitcombe v. Yolo County
(1977) 73 Cal.App.3d 698 13

Williams v. Hartman
597 N.Ed.2d 1024 (Mass. Sup. Ct. 1992) 10

Youngberg v. Romeo
457 U.S. 307, 324, 73 L.Ed.2d 28,
102 S.Ct. 2452 (1982) 8, 9, 12

Constitutional Provisions:

28 U.S.C. § 1254(3) 2

42 U.S.C. § 1983 2, 3

42 U.S.C. § 1988 3

Other Authorities

1 Harper, James & Gray, *Law of Torts*,
§ 20.2, at 91-92 (2d ed. 1986) 14

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OPINION BELOW

The relevant decision of the United States Court of Appeals for the Ninth Circuit was not reported, and is set forth at Appendix A-1 to A-16.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on October 4, 1993. A petition for writ of certiorari is due on or before December 3, 1993.

This Court has jurisdiction to review the lower decision by writ of certiorari under 28 U.S.C. § 1254(3).

APPLICABLE FEDERAL LAWS

1. United States Constitution, fourteenth amendment, section 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

2. 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

3. 42 U.S.C. § 1988:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

1. Nature of this Controversy.

This civil rights action under 42 U.S.C. § 1983 arises from the death of a mental patient at Napa State Hospital ("NSH"), a California State mental hospital. In April of 1985, the decedent, Ms. Conners, was murdered by another patient at NSH, one John Duncan. It is indisputable that, at the time of her death, Ms. Conners was a voluntary patient at NSH - having been placed there by her conservator, with the consent of the parents.

Ms. Conners' parents commenced this action in 1986.[1/] They sued none of the NSH physicians or staff who were directly responsible for the care and treatment of their decedent or the assailant. Instead, the respondents named as defendants the Director of the California Department of Mental Health, Dr. Michael O'Connor, as well as the top administrators at the hospital - including petitioner Thaddeus Kostrubala, the Medical Director; Fred Valenzuela, the Executive Director; and Stephen Donoviel, Clinical Director.

As summarized by the lower court, the case against the defendant hospital administrators focused upon the assailant-patient's receipt of a "P-card," in March of 1985, which conferred upon Duncan the privilege of moving about on the hospital grounds. (Appendix at A-4). The theory of respondents' case was that, without a P-card, Duncan could not have wandered the NSH grounds unsupervised, and thus, the issuance of the P-card to Duncan a month prior to the assault was the "cause" of the murder of respondents' decedent, NSH patient Conners. (Appendix at A-5).

In the ensuing five years of litigation, respondents' attorneys spared no expense, and left no rock unturned in their pursuit of discovery and pretrial proceedings against the four hospital administrator defendants. However, following a jury trial that lasted less than one week,

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1. At the same time, respondents initiated a "back-up" action against the same defendants in State court, asserting the same facts as alleged in this federal action, but premising recovery solely upon a state tort law theory - of negligence.

plaintiffs-respondents were able to obtain a verdict only of $281,000, an amount only slightly better than the combined defendants' pretrial settlement offer. Of the four defendants, the verdict only found two liable, Drs. O'Connor[2/] and Kostrubala, petitioner herein.

Respondents' success was clearly very limited, especially when a comparison of the amounts sought in the litigation are compared with the final recovery. Their counsel requested the jury to award compensatory damages of $600,000, plus correspondingly-large amount of punitive damages allegedly needed to "send a message." The verdict, however, contained no punitive damage award; and the amount of the award was less than half of the amount of the compensatory damage which had been sought.

Despite their limited success at trial, and their prevailing on the merits only as to one of the four defendants, respondents' counsel submitted a fee request of $375,000. According to respondents' fee request, their counsel had expended *forty* full weeks of pretrial work in preparation for the one week trial.[3/] On its face, the fee award was excessive: although no relief except damages had ever been sought, the fees awarded were more than 120% of the verdict. The amount was more than three times the amount respondents' counsel had agreed to accept in their 40% contingent fee agreement with

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2. The verdict against Dr. O'Connor was reversed by the Ninth Circuit. Appendix, at A-6 to A-9.

3. This figure excludes the time respondents' counsel spent on prior appellate work.

respondents.

2. Proceedings Below.

In his post-trial motions to set aside the verdict and judgment, petitioner Dr. Kostrubala argued that his failure to investigate or intervene in Duncan's case was not the proximate cause of the subsequent attack, and the death of respondent's decedent. Duncan had obtained grounds privileges upon the recommendation and approval of his treating physician and treatment team, in compliance with the hospital's policy. Although Dr. Kostrubala had, as Medical Director of the hospital, the authority to intervene in these professionals' treatment decision, there was no evidence presented to establish that if, in fact, Dr. Kostrubala had intervened, the assailant's grounds privileges would have been revoked.[4/] The district court, however, denied petitioner's motions for judgment N.O.V. and for a new trial, on the grounds that petitioner, as Medical Director, had the authority to investigate and intervene to revoke Duncan's P-card, but had failed to do so.

The Ninth Circuit affirmed liability as to petitioner Dr. Kostrubala only, but reversed the verdict as to Dr. O'Connor - on proximate cause grounds. (Appendix at A-5, A-8). The Court of Appeals found

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4. Indeed, the only testimony on point, from Duncan's psychiatrist, Dr. Sikand, established that in March of 1985, the treatment team diagnosed Duncan as doing well in treatment, and for that reason, found grounds privileges appropriate.

that Dr. Kostrubala's nonfeasance, in failing to investigate and intervene somehow "caused" the murder of respondents' decedent in April 1985, a month after the assailant was granted grounds privileges by his treating psychiatrist. (Appendix at A-5).

3. Reasons for Granting of this Petition.

The result below, in affirming liability as to petitioner, was clearly erroneous, and contrary to well-established precedent of this Court. There was no factual dispute as to the decedent's status as a voluntary patient at the hospital. However, the lower court refused to even consider this legal issue which was a predicate to any § 1983 liability, i.e., whether a voluntary patient has any due process right to safety, after *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). There is a conflict below in the circuit Courts of Appeal, and resolution by the Court is necessary to resolve this important issue, which at its core, concerns the basic structure of Federalism: should a duty to protect under state tort law be converted into a § 1983 duty to protect simply because the state offers voluntary treatment to a mental patient?

Secondly, by allowing a supervisory-level hospital administrator to be held liable for nonfeasance, and imposing liability for errors in professional judgment at a lower level, the Ninth Circuit has adopted an expansive doctrine of proximate cause under § 1983 which cannot be squared with the earlier pronouncements of this Court, most notably in *Martinez v. California*, 444 U.S. 277 (1980)

and *Rizzo v. Goode*, 423 U.S. 362 (1976). Apparently, given the lower court's decision in this case, a further clarification of the issue is needed.

Finally, granting of this petition is necessary so that this Court may exercise its supervisory powers to correct the lower court's failure to heed the attorney's fee award standard of reasonableness set forth by the Court in the recent decision in *Farrar v. Hobby*. The lower courts should not, in the guise of "distinguishing" this Court's rulings, be allowed to substitute rules of law contrary to those announced by this Court.

ARGUMENT

I

REVIEW OF THIS CASE IS NEEDED TO RESOLVE AN IMPORTANT AND HERETOFORE UNRESOLVED ISSUE - WHETHER THE STATES HAVE A CONSTITUTIONAL DUTY TO PROTECT VOLUNTARY PATIENTS AT INSTITUTIONS

In *Youngberg v. Romeo*, 457 U.S. 307, 324, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982), this Court held that a mental patient involuntarily committed to a state hospital enjoyed "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." On the other hand, in *DeShaney v. Winnebago County Department of Social*

Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Court held that county officials did not violate a young boy's due process rights when, in spite of repeated warnings, they failed to take action to protect the boy from beatings by his father.

In *DeShaney*, the Court held that the county officials had not violated the boy's substantive due process rights because "the [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." 489 U.S. at 195.

The Court noted that *Youngberg* and other cases had recognized that the State has "in certain limited circumstances . . . affirmative [constitutional] duties of care and protection with respect to particular individuals." Id. at 198. The Court distinguished those cases, however, because "they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being [citations omitted] . . . . It is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration, institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protections of the Due Process Clause . . . ." Id. at 199-200 (emphasis added).

Since *DeShaney*, a number of circuits, district courts and state courts have reached differing results when considering whether voluntary patients at state mental institutions are protected by a constitutional substantive due process right to safety. *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989); *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984), cert. denied, 107 L.Ed.2d 835 (1990); *Ridler v. Four County Counseling Center*, 809 F.Supp. 1343 (N.D. Ind. 1992); *Jordan v. State of Tenn.*, 738 F.Supp. 258 (M.D. Tenn. 1990); *Williams v. Hartman*, 597 N.Ed.2d 1024 (Mass. Sup. Ct. 1992).

For example, in the leading case of *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992), the First Circuit held that a voluntary mental health patient who was injured while in the custody of a State facility did not have a substantive due process right to protection, although the patient might have a right protected under state tort law. The *Monahan* court persuasively reasoned that, under *DeShaney*:

> "Because the state did not commit Monahan involuntarily, it did not take an affirmative act of restraining his liberty, an act which may trigger a corresponding due process duty to assume a special responsibility for his protection." 961 F.2d at 991.

Simply stated, petitioner contends that the State does not owe a constitutional right to safe conditions to all persons on state property or who are cared for by state employees. A different construction is inconsistent with the very premise of the Due Process clause, which does not impose an affirmative duty upon the States to protect their citizens. Rather, it serves as a limitation on the States' power to act. *DeShaney*, 489 U.S. at 195.

The importance of the determination of this issue can hardly be understated, given the existence of large numbers of voluntarily-admitted patients present not only in the State of California's mental institutions, but in those of the several States nationwide.

Moreover, should voluntary mental hospital patients be accorded due process rights to safety, enforceable in the federal courts pursuant to 42 U.S.C. § 1983, there would seem to be no reasoned basis for excluding from constitutional litigation injuries which may occur during the many other types of custodial relationships States and local governments are involved in, in this day and age. School children, foster children, and many other categories of voluntary wards may likewise claim protection, under the aegis of the Constitution, for tort-type injuries more properly addressed in the state courts.

II

THE CONCLUSION THAT PETITIONER'S INACTION CONSTITUTED A DUE PROCESS DEPRIVATION CANNOT BE SQUARED WITH THIS COURT'S PROXIMATE CAUSE ANALYSIS IN *MARTINEZ v. CALIFORNIA*

As the Ninth Circuit alluded to in its unpublished opinion on the merits, petitioner Dr. Kostrubala, as Medical Director of a 1500-patient state mental hospital, was not held liable for affirmative misconduct. Duncan, the patient who committed the assault on respondents' decedent, had obtained grounds privileges a month prior to the death from his treating psychiatrists, and treatment team. (Appendix at A-4).

It was undisputed that petitioner had no role in approving the grant of grounds privileges in March of 1985.[5/] Rather, Dr. Kostrubala was held liable for inaction -nonfeasance- for failing to investigate and intervene, when he learned that the assailant had obtained

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5. None of the members of the assailant's treatment team - i.e., the psychiatrist, nurses and staff who were responsible for evaluating and granting Duncan grounds privilege, were ever sued. No finding was ever made that the persons who actually evaluated Duncan and granted grounds privileges, did so in the absence of professional judgment, in violation of *Youngberg v. Romeo*, 457 U.S. 307 (1982).

grounds privileges from his treatment team.[6] No evidence was relied upon by the Ninth Circuit, as none had been presented at trial, which proved that if petitioner had investigated, the assailant's grounds privileges would necessarily have been revoked.

This conclusion, that petitioner's intervention would have prevented the harm was pure speculation, insufficient to have supported a finding of proximate cause, even applying state tort law principles. *Whitcombe v. Yolo County* (1977) 73 Cal.App.3d 698 (probation officer's failure to investigate probationer to ascertain danger not proximate cause of probationer's assault on third person - even if investigation had taken place, no guarantee that revocation would occur); *Brenneman v. State* (1989) 208 Cal.App.3d 812 (parole officer's failure to investigate parolee's status not proximate cause of parolee's murder, as subsequent revocation was discretionary); *State v. Superior Court (Perry)* (1984) 150 Cal.App.3d 848 (same).[7]

It is axiomatic even in tort law that a defendant cannot be held liable for an injury unless it can be

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6. Ironically, the Ninth Circuit recognized that the only affirmative action Dr. Kostrubala took, as Medical Director, was in December of 1984, six months before the assault, when he approved the *revocation* of the assailant's grounds privileges, for 90 days. (Appendix at A-4).

7. To the extent that tort law concepts of proximate cause are incorporated into § 1983, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), this Court cautioned in *Martinez* that even if proximate cause is present, for purposes of tort law, an actionable deprivation of Constitutional magnitude may be absent. See pp. 14-15, infra.

concluded that the injury would not have occurred but for the conduct of the defendant. 1 Harper, James & Gray, *Law of Torts*, § 20.2, at 91-92 (2d ed. 1986). As a subsidiary result of this rule, courts have held an official's nonfeasance not to be the proximate cause of an injury unless, as a matter of reasonable certainty, it could be concluded that the official's action would necessarily have prevented the harm.

In this case, even if petitioner had intervened, there was no guarantee that he would have overridden the judgment of the assailant's treatment team, and have revoked Duncan's grounds privileges. It is, likewise, pure speculation to conclude that, even if the grounds privileges of the assailant had been revoked in March of 1985, the revocation would still have been in effect in April of 1985 (or later), so as to have removed forever the threat of any potential assault by Duncan.

By allowing liability to be imposed in the circumstances of this case, the Ninth Circuit has adopted an expansive view of proximate cause for purposes of § 1983 liability which simply cannot be squared with this Court's decision in *Martinez v. California*, 444 U.S. 277 (1980). In *Martinez*, plaintiffs alleged that a parole board erred in granting parole (i.e., off-grounds privileges) to one who later killed the plaintiffs' decedent.

In holding that the board's grant of parole was not a constitutional deprivation, this Court noted that:

> "Regardless of whether, as a matter of state tort law, the parole board could be said either to have a 'duty' to avoid harm to the victim or to have proximately

> caused her death, [citations] we hold that . . . . [defendants] did not 'deprive' [the] decedent of life within the meaning of the Fourteenth Amendment."

444 U.S. at 285.

If the action in *Martinez* of the defendant parole board members in granting parole to the assailant was too remote to be sufficient to support a federal claim, surely the inaction of petitioner here cannot reasonably be deemed to be a "deprivation". The lower court's conclusion that petitioner's inaction was sufficient to "deprive" respondents' decedent of due process is fundamentally inconsistent with this Court's due process jurisprudence, which has consistently recognized the principle that it is error to equate tort law wrongs with violations of the Due Process Clause. *Baker v. McCollan*, 443 U.S. 137 (1979). At this Court stated in *Baker v. McCollan*:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law theories."

443 U.S. at 146 n. 15.

Even assuming that, as a voluntary patient, respondents' decedent in this case had a federal substantive right to be protected, that right clearly was not implicated unless it could be concluded that the State, qua state, inflicted the harm. That is so because the

Fourteenth Amendment protects only against deprivations by the "State . . . of life . . . without due process of law." Because, in this case, the petitioner's inaction was only a "remote" circumstance in the causal chain, the lower court's holding must be reversed.

III

THE DECISION OF THE NINTH CIRCUIT ON FEES IS FUNDAMENTALLY INCONSISTENT WITH THE DECISION OF THIS COURT IN *FARRAR v. HOBBY*

In holding that the respondents were entitled to a full attorney's fee award, despite their extremely limited success, the court below misread or ignored the rule of law only recently reaffirmed by this Court in its decision in *Farrar v. Hobby*, 506 U.S. _____, 121 L.Ed.2d 494 (1992).[8/] In *Farrar*, this Court reaffirmed and clarified its requirement that the reasonableness of a fee award is to be gauged by a comparison between the relief sought by the plaintiffs, and the recovery actually obtained.

As the Court stated forthrightly:

> "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to

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8. No error in this regard may be attributed to the district court, which entered its decision on fees prior to the decision in *Farrar v. Hobby*. Indeed, the district court found respondents to have "padded" their fees.

> the amount of damages awarded as compared to the amount sought."

121 L.Ed.2d at 505, quoting *Riverside v. Rivera*, 477 U.S. 561, 585 (1986).

This Court mandated a comparison between the relief sought, and that obtained in a civil rights lawsuit because "if a plaintiff has achieved only partial or limited success, the product of hours reasonably expended . . . times a reasonable hourly rate [i.e., the "lodestar"] may be an excessive amount." Id. quoting *Hensley v. Eckerhardt*, 461 U.S. 424, 436 (1983).

In this case, however, the lower court, while giving lip-service to *Farrar v. Hobby*, substituted an inherently different test. Eschewing any comparative analysis of the degree of success, the Ninth Circuit instead applied an any "substantial" result test: i.e., so long as a plaintiff gains a damage verdict which is "substantial," it will be upheld, without reference to the degree of success the award represents. (Appendix at A-15).

This Court may read for itself the lower court's decision, which essentially converted this Court's test in *Farrar v. Hobby* into a de minimus recovery test, stating that this Court's opinion was "distinguishable" under the facts. (Appendix, at A-15 to A-16). If the lower court's opinion and decision is allowed to stand, this will allow that court, by a process of strained judicial interpretation, to substitute its own less-stringent standard of reasonableness, in derogation of the test set forth by this Court in *Farrar v. Hobby*.

Had the court below properly utilized the comparison test of *Farrar v. Hobby*, it would have been

compelled to have reversed the district court's fee award.

As Chief Justice Rehnquist aptly observed in his dissent from the plurality opinion in *Riverside v. Rivera*, 477 U.S. 561, 593 (1986), the lower courts cannot "suspend their disbelief" when determining reasonable fees under § 1988:

> "One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages." 477 U.S. at 595.

Justice Rehnquist further stated, in exemplifying this point:

> "If A has a claim for contract damages in the amount of $10,000 against B, and retains an attorney to prosecute the claim, it would be both extraordinary and unjustifiable, in the absence of any special arrangement, for the attorney to put in 200 hours on the case and send the client a bill for $25,000. Such a bill would be 'unreasonable,' regardless of whether A obtained a judgment against B for $10,000 or obtained a take-nothing judgment."

477 U.S. at 593.

Because a civil rights plaintiff, unlike a usual paying client, has no incentive to monitor his attorney's hours, it is crucial that the lower courts do not uncritically enter full fee awards without engaging in the comparative analysis mandated by the Court in *Farrar v. Hobby*. The Court's approach, if it would have been followed, would have prevented the windfall award entered in this case:

> "[N]o client, however wealthy, would pay a lawyer more than a dollar to pursue a dollar's worth of recovery . . ." *Kirchoff v. Flynn*, 786 F.2d 320, 325 (7th Cir. 1986).

It is incomprehensible that the lower court, acting so shortly after this Court's decision in *Farrar v. Hobby*, could authorize an award so obviously inconsistent with the rule of fee reasonableness announced therein. In the exercise of its supervisory authority over that court, this Court should summarily reverse the lower court's fee decision, ordering it to remand the fee issue to the district court for a redetermination of the fees, consistent with this Court's *Farrar v. Hobby* decision.

CONCLUSION

For all of the above-stated reasons, the decision and judgment of the Ninth Circuit should be reversed.

DATED: November 1, 1993

Respectfully submitted,

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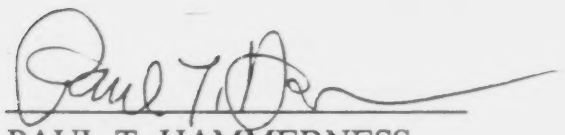

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TABLE OF CONTENTS

PAGE

MEMORANDUM OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING IN PART AND REVERSING IN PART [APPENDIX A] 1-16

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESTATE OF MARILYN MARIE CONNERS, by its administrator, Howard Meredith; HOWARD MEREDITH; LILLIAN BEATTY, individuals, as sole heirs of Marilyn Marie Conners, Plaintiffs-Appellees, Cross-Appellants, v. DENNIS M. O'CONNOR; THADDEUS KOSTRUBALA, Defendants-Appellants, Cross-Appellees.	**[Filed October 4, 1993]** CA Nos. 92-15241 92-16414 92-16775 92-16917 DC No. CV-86-01898-FMS MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Argued and Submitted May 11, 1993
San Francisco, California

BEFORE: BROWNING and CANBY, Circuit Judges, and KELLEHER,** District Judge

This civil rights action under 42 U.S.C. § 1983 arises from the death of a patient at Napa State Hospital ("NSH"), a California mental institution. Dr. Dennis Michael O'Connor, the former Executive Director of NSH, and Dr. Thaddeus Kostrubala, the Medical Director of NSH, appeal the jury verdict against them. The consolidated cross-appeals challenge the district court's award of attorney's fees to the plaintiffs. We affirm in part and reverse in part.

FACTS & PROCEDURAL BACKGROUND

In 1979, John Duncan was committed to NSH pursuant to Cal. Penal Code § 1026, after having pleaded not guilty by reason of insanity to a murder charge. In 1982, Marilyn Marie Conners was civilly committed to NSH after suffering injuries in an automobile accident that left her mentally disabled. In April 1985, on the grounds of NSH, Duncan raped and murdered Conners.

** The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

In 1986, Conner's parents and the administrator of her estate brought this section 1983 action against four doctors and administrators at NSH. In a prior interlocutory appeal, this court affirmed the district court's denial of the defendants' motion for summary judgment based on qualified immunity. Estate of Conners v. O'Connor, 846 F.2d 1205 (9th Cir. 1988), cert. denied, 489 U.S. 1065 (1989). In September 1991, the case went to trial. The district court denied the defendants' motions for a directed verdict, and the jury returned a verdict of $280,785 against Drs. O'Connor and Kostrubala. These defendants moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, for a new trial. The district court denied the motion, and Drs. O'Connor and Kostrubala appealed. Both sides appealed from the district court's award of attorney's fees to the plaintiffs.

ANALYSIS

I. Motion for JNOV

Drs. O'Connor and Kostrubala contend that the jury-verdict against them is not supported by substantial evidence and, therefore, that the district court erred by denying their motion for JNOV. We review de novo the denial of a motion for JNOV. Erickson v. Pierce County, 960 F.2d 801, 804 (9th Cir.), cert. denied, 113 S. Ct. 815 (1992). Without considering the credibility of the witnesses or weighing the evidence, we must determine whether the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can reasonably support a judgment in favor of the nonmoving party. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1151 (9th Cir. 1988) (citations

omitted). We may not substitute our judgment for that of the jury, but rather must determine whether the verdict is supported by substantial evidence. Id. A patient committed to a state mental institution has a constitutionally protected liberty interest in personal security and reasonably safe conditions of confinement. Youngberg v. Romeo, 457 U.S. 307, 324 (1982). In a section 1983 action against officials of such an institution:

> [A] decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323 (footnote omitted).

A. Case Against Dr. Kostrubala

The case against Dr. Kostrubala focused primarily on Duncan's receipt in March 1985 of a "P-card," which conferred on him the privilege of moving about the grounds. Duncan committed the murder while out on the grounds pursuant to this P-card. Dr. Kostrubala argues that there was insufficient evidence to establish that he participated in the decision to grant grounds privileges to Duncan, and that therefore he did not fail to exercise professional judgment. We reject this argument.

The evidence at trial demonstrated that on December 13, 1984, Duncan's P-card was revoked for ninety days because he was found "to be out of bounds

with a female visitor." After this ninety-day period, Duncan's P-card was reissued. A written policy at NSH required that, before a revoked P-card was reissued, the patient had to be evaluated by his treatment team, and reissuance of the card had to be approved by the program director. Duncan's file, however, contained no record of any such assessment prior to the reissuance of his P-card on March 13, 1985. The plaintiffs' theory at trial was that the reissuance of Duncan's P-card without, at a minimum, compliance with the NSH policy, represented gross negligence and a substantial departure from accepted professional judgment. The plaintiffs presented substantial evidence that Kostrubala had the ultimate responsibility for the issuance of P-cards to penal code patients, and that Kostrubala was familiar with Duncan and his propensity for violence. The plaintiffs also presented evidence that, approximately two weeks before Conner's death, Kostrubala told the executive director of NSH that he was surprised that Duncan had a P-card; Kostrubala further stated that he intended to "pull" the card. Moreover, the plaintiffs provided expert testimony that supported their claim that Dr. Kostrubala's failure to prevent the reissuance of Duncan's P-card in March 1985 constituted such a substantial departure from accepted professional judgment that it was not based on professional judgment. This evidence and its inferences, viewed in the light most favorable to the plaintiffs, reasonably supports the verdict against Kostrubala. Accordingly, we conclude that the district court did not

err by denying his motion for JNOV. See The Jeanery, 849 F.2d at 1115.[1]

B. Case Against Dr. O'Connor

Dr. O'Connor was the Executive Director of NSH from October 1977 until October 1983, when he became the Director of the California Department of Mental Health. The plaintiffs' case against O'Connor was based on his failure in 1982-1983 to transfer Duncan from NSH to Atascadero State Hospital ("Atascadero"), a higher-security institution. Dr. O'Connor argues that his conduct was not the proximate cause of Conner's death. We agree.

Under section 1983, "'[a] supervisor may be liable if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (quoting Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)) (emphasis added in Redman), cert. denied, 112 S. Ct. 972 (1992). "'The requisite causal connection can be

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1. Kostrubala also contends that he is entitled to qualified immunity. We disagree. This court previously rejected the defendants' claim of qualified immunity because a genuine issue of material fact existed regarding whether they had violated Conner's clearly established rights to personal security and a reasonably safe environment. Estate of Conners, 846 F.2d at 1208-09 (citing Youngberg, 457 U.S. at 323). At trial, the jury applied the Youngberg standard and found in favor of the plaintiffs. In essence, therefore, Kostrubala's claim of qualified immunity is subsumed by his claim that the jury's verdict is not supported by the evidence. Because we have found that substantial evidence supports the verdict against Kostrubala, he is not entitled to qualified immunity.

established . . . by setting in motion a series of acts by others to inflict the constitutional injury.'" Redman, 942 F.2d at 1447 (quoting Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978)). Even if the defendant's conduct is an actual or a "but for" cause of the plaintiff's injury, however, the question remains whether the defendant's conduct is the legal or proximate cause. White v. Roper, 901 F.2d 1501, 1505-06 (9th Cir. 1990) (citing W. Prosser & W. Keeton, The Law of Torts, §42, at 272-73 (5th ed. 1984)). Whether an intervening cause supersedes the defendant's liability depends upon what was reasonably foreseeable to the defendant when he committed the challenged conduct. Id. at 1506 (citing Prosser & Keeton, supra, § 44, at 303-04).

On December 11, 1982, after Duncan had violated hospital rules prohibiting patients from possessing contraband, Dr. O'Connor determined that Duncan was a security risk and had to be transferred to Atascadero. Before the transfer could be accomplished, however, Duncan's mother filed a petition for a writ of habeas corpus in state court and obtained a temporary automatic stay of the transfer. On March 17, 1983, Duncan's attorney wrote a letter to the court stating that: "I have been informed by Max Cox of Napa State Hospital that they do not intend to pursue the matter of transferring Mr. Duncan to Atascadero State Hospital, and am therefore having the hearing dropped from the calendar." At trial, Dr. O'Connor testified that he could not remember why he had not pursued his attempt to transfer Duncan to Atascadero, nor could he remember why the state court hearing had been cancelled.

Our review of the record reveals that the evidence does not support the jury's determination that O'Connor's failure to transfer Duncan to Atascadero in 1983 was the proximate cause of Conner's death. The aborted attempt to transfer Duncan occurred more than two years before the murder. More important, Duncan first received grounds privileges in November 1983, after Dr. O'Connor had left NSH. Without a P-card, Duncan could not have wandered the NSH grounds unsupervised; the reissuance of Duncan's P-card in March 1985 thus was the immediate cause of the murder. Moreover, much of the plaintiffs' case was devoted to demonstrating that, in light of Duncan's numerous violations of hospital rules and his propensity for violence, the grant of grounds privileges to him represented a complete absence of professional judgment by the NSH staff. Viewing the evidence in the light most favorable to the plaintiffs, we conclude that it was not reasonably foreseeable to Dr. O'Connor in March 1983 that Duncan later would obtain grounds privileges and murder another patient. Because the grant of grounds privileges to Duncan in March 1985 was an intervening cause of Conner's death that was not reasonably foreseeable to O'Connor, it frees him of liability for the deprivation of Conner's constitutional rights. See Redman, 942 F.2d at 1447; White, 901 F.2d at 1505-06. Accordingly, the district court erred by denying O'Connor's motion for JNOV, and we reverse the

judgment against him. See The Jeanery, 849 F.2d at 1151.[2/]

II. Motion for a New Trial

Dr. Kostrubala asserts that the district court abused its discretion by denying his motion for a new trial. He argues that he was denied a fair trial because plaintiffs' counsel used improper tactics that were designed to inflame the jury. In particular, he complains that plaintiffs' counsel (1) repeatedly referred to murder and rape, (2) insinuated that the defendants were involved in a conspiracy to prevent Duncan from being transferred to Atascadero, and (3) improperly appealed to the jury's sympathy during closing argument. We reject these arguments.

We review for an abuse of discretion the district court's denial of a motion for a new trial. McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983). "To warrant reversal on grounds of attorney misconduct, the flavor of the misconduct 'must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" Id. (quoting Standard Oil Co. v. Perkins, 347 F.2d 379, 388 (9th Cir. 1965)). Kostrubala has not demonstrated that any misconduct by plaintiffs' counsel so permeated the trial that it prevented the jury from fairly considering the evidence. Accordingly, we find that the

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2. Because we find that O'Connor's conduct was not the proximate cause of Conner's death, we need not consider his arguments that he is entitled to absolute or qualified immunity.

district court did not abuse its discretion by denying the motion for a new trial. See id.[3]

III. Jury Instructions

Kostrubala next contends that the district court erroneously instructed the jury on the standard of liability. He objects to the instructions' reference to "deliberate indifference," and argues that the Supreme Court rejected a deliberate indifference standard in Youngberg. We find no error.

We review the jury instructions to "'determine whether, viewing the instructions as a whole, the court gave adequate instructions on each element of the case to ensure that the jury fully understood the issues,' and to determine 'whether the instruction is misleading or states the law incorrectly to the prejudice of the objecting party.'" Martinelli v. City of Beaumont, 820 F.2d 1491, 1493 (9th Cir. 1987) (quoting Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1340 (9th Cir. 1986)).

Here, the district court instructed the jury that the plaintiffs had to prove:

> First, that one or more of the defendants acted or failed to act with deliberate indifference to Marilyn Conners' safety such that defendants' acts or omissions constituted such a substantial departure from accepted professional judgment,

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3. Kostrubala also contends that the motion should have been granted because the verdict is against the weight of the evidence. We have reviewed the evidence and determined that it supports the verdict against him. We therefore reject this contention.

> practice or standards, such that you conclude that no professional judgment was, in fact, exercised;
>
> . . .
>
> * * *
>
> The decisions, if any, made by a defendant with respect to the supervision, care, or treatment of either Duncan or Ms. Conners are presumed to have been valid. This presumption of validity can only be overcome if you find that a decision made by a defendant which proximately caused the harm was a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the defendant did not base his act or omission on such a judgment.

Reporter's Transcript, October 11, 1991, at 35-36.

The language of the challenged instruction was drawn from this court's opinion in the defendants' prior appeal, in which we held that:

> Liability may be imposed on a professional state officer only when his or her decision is so objectively unreasonable as to demonstrate that he or she actually did not base the challenged decision upon professional judgment. See Youngberg, 457 U.S. at 323. We believe that this standard is equivalent to that required in ordinary tort cases for a finding of

> conscious indifference amounting to gross negligence.

Estate of Conners, 846 F.2d at 1208. Because the language of the district court's instructions tracks this precedent, we conclude that, viewed as a whole, the instructions adequately explained the standard of liability and accurately stated the law. See id.; Martinelli, 820 F.2d at 1493.

IV. Defendants' Appeal from Award of Attorneys' Fees

A. Hourly Rate Awarded by the District Court

The defendants argue that the district court erred by awarding plaintiffs' attorneys hourly rates that exceeded their customary billing rates. We disagree.

"Reasonable fees under § 1988 are calculated according to the prevailing market rates in the relevant legal community, and the general rule is that the rates of attorneys practicing in the forum district . . . are used." Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1993) (citations omitted). Billing rates "should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity." Davis v. City and County of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992). Evidence of the attorneys' customary billing rate may be considered, but the district court does not abuse its discretion if it chooses instead to apply a reasonable community standard. White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983).

The evidence before the district court established that plaintiffs' attorneys John Scott and Robert Brown customarily charge their clients $200 per hour. In this case, however, they were seeking hourly rates of $250 and $285 respectively. The district court also considered declarations from several attorneys practicing in San Francisco who stated that the requested hourly rates were within the range of prevailing market rates for attorneys of similar skill and experience. Given this evidence, the district court decided to reduce the requested hourly rates and award $225 per hour for Scott and $250 per hour for Brown. Because the district court considered the proper factors and calculated a reasonable rate "according to the prevailing market rates in the relevant legal community," we find no abuse of discretion. See Gates, 987 F.2d at 1405; Davis, 976 F.2d at 1545.

B. Number of Hours Expended by Plaintiffs' Counsel

The defendants argue that plaintiffs' counsel were compensated for an unreasonable number of hours. In particular, they argue that counsel should not have been compensated for hours spent conducting unnecessary discovery, interviewing and deposing witnesses who did not testify at trial, and preparing for an unsuccessful arbitration. These arguments fail.

The district court reduced the fee request by denying compensation for (1) hours claimed for "telephone conferences" and "attorney meetings", the purposes of which were not adequately documented; (2) hours spent on state court proceedings; and (3) hours that were duplicative. Because the record demonstrates that

the district court carefully and critically evaluated the fee request, we find no abuse of discretion. See Gates, 987 F.2d at 1398-99 (district court must evaluate critically the fee request and articulate reasons for its findings regarding the propriety of the hours claimed).

C. Contingent Fee Argument

The defendants argue that the fee award of $315,433.94 is excessive in light of the contingent fee agreement, under which plaintiffs' counsel would have received only $112,400. This argument lacks merit. The Supreme Court has held that a contingency-fee agreement does not serve as a cap on the fee award under 42 U.S.C. § 1988. Blanchard v. Bergeron, 489 U.S. 87, 94-95 (1989). Instead, such an agreement is simply a factor that the district court may consider in setting a reasonable fee award.
Id. at 92-93.

Here, the district court acted within its discretion because it considered the contingent-fee agreement, but decided that a larger fee award was warranted. We find that the district court's fee award is reasonable. See id.; Quesada v. Thomason, 850 F.2d 537, 543 (9th Cir. 1988) (among other reasons for rejecting a private fee agreement as a cap on a fee award under section 1988, defendants "should not benefit from the private agreement by being permitted to pay anything less than a reasonable hourly wage").

D. Limited Success at Trial

Finally, the defendants asserted that the fee award is excessive because the plaintiffs were only partially

successful at trial. We reject this argument.

The Supreme Court has stated that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" Farrar v. Hobby, 113 S. Ct. 566, 574 (1992) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)). In Farrar, the plaintiffs had received $1 in nominal damages in a section 1983 action in which they had sought $17 million. Id. Nevertheless, the district court had awarded them over $300,000 in attorney's fees and costs. Id. at 570. The Supreme Court held that the plaintiffs were not entitled to receive a fee award because their success in the action had been so limited. Id. at 574-75.

Here, in contrast, the plaintiffs obtained a substantial award of compensatory damages. Moreover, unlike the situation in Farrar, the fee award here is not grossly disproportionate to the damage award. We conclude that, because the plaintiffs' achieved a substantial victory, this case is distinguishable from Farrar, and a reduction in the fee award is not required.

V. Plaintiffs' Cross-Appeal from Fee Award[4/]

The plaintiffs argue that the district court abused its discretion by refusing to award fees: (1) for hours attorney Scott worked on the case before he filed a "notice of association of counsel," and (2) for the time the "second-chair" attorney spent at trial. These arguments are not persuasive. Having considered the record, we

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4. We address plaintiffs' challenge to the district court's jurisdiction to reduce the magistrate's fee award in a published opinion, filed simultaneously with this memorandum disposition.

conclude that it was not unreasonable for the district court to disregard preliminary hours spent by Scott, nor to find "second-chair" hours unnecessarily expended. The overall fee award was "reasonable" within the meaning of section 1988.

CONCLUSION

We affirm the judgment against Dr. Kostrubala, and we affirm the district court's award of attorney's fees to the plaintiffs. We reverse the judgment against Dr. O'Connor.

AFFIRMED IN PART; REVERSED IN PART; COSTS AWARDED IN FAVOR OF THE PLAINTIFFS-APPELLEES AGAINST DEFENDANT KOSTRUBALA[5/]

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5. The plaintiffs have requested an award of attorney's fees for these consolidated appeals. Their request should be made to the court pursuant to Ninth Cir. R. 39-1.6.

Supreme Court, U.S.
FILED
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No. 93-741

In The

Supreme Court of the United States

October Term, 1993

THADDEUS KOSTRUBALA, M.D.,

Petitioner,

vs.

ESTATE OF CONNERS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state officials are constitutionally obligated to provide safety and security to a mental patient committed to a state hospital?

2. Whether the court of appeals correctly held that substantial evidence supported the verdict against a hospital administrator who permitted a violent mental patient the freedom to roam hospital grounds, resulting in the rape and death of the decedent?

3. Whether, despite the substantial verdict in the trial court, this Court should exercise supervisory powers and reverse the award of reasonable attorneys' fees to the plaintiffs?

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. REASONS FOR DENYING THE WRIT 4

III. CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 5

Estate of Conners v. O'Conner, 846 F.2d 1205 (9th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) 1

Estate of Conners v. O'Connor, ___ F.3d ___, 1993 U.S. App. Lexis 25098 (9th Cir. Oct. 4, 1993) 4

Farrar v. Hobby, ___ U.S. ___, 121 L.Ed. 2d 505 (1993) 6

Hensley v. Eckerhart, 461 U.S. 424 (1983) 6

Youakim v. Miller, 425 U.S. 231 (1975) 4

Youngberg v. Romero, 457 U.S. 307 (1982) 4

STATUTES

42 U.S.C. § 1983 2

42 U.S.C. § 1988 6

Cal. Welf. & Inst. Code §§ 5350-5368 2

I. STATEMENT OF THE CASE

Petitioner asserts, without any reference to the record, that the decedent, Marilyn Marie Conners, was voluntarily committed to the Napa State Hospital in California. (Petition for Writ of Certiorari [hereafter "Petition"] at 3. Petitioner then argues that the decedent's right's under the Fourteenth Amendment depend on her admission status, and that voluntary patients are not entitled to constitutionally mandated safety and security.

The assertion that Marilyn Marie Conners was voluntarily admitted before her death is misleading. First, petitioner never raised a factual or legal issue concerning Conners's admission status *until after oral argument in the court of appeals*. The case had proceeded on an earlier interlocutory appeal, *Estate of Conners v. O'Conner*, 846 F.2d 1205 (9th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), and then to trial on the theory that petitioner was subject to Fourteenth Amendment standards of conduct. After oral argument in the Ninth Circuit, petitioner belatedly attempted to argue, for the first time, that Conners had been committed voluntarily to the Napa State Hospital. Motion to File Supplemental Brief; Supplemental Brief Re: Liability.[1] However, petitioner's motion seeking leave to file a supplemental brief in the court of appeals clearly recognized that Conners's admission status had never been raised previously. As stated by petitioner in the motion:

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[1] Oral argument was held on May 11, 1993. Petitioner filed his motion to file a supplemental brief on May 21, 1993.

> As set forth more fully hereinafter, and in the supplemental brief filed herewith, it appears that to date the parties and the Court have incorrectly assumed that the rights and obligations herein were governed by a substantive due process standard under *Youngberg v. Romero*, 457 U.S. 307 (1992)[sic]

Motion to File Supplemental Brief at 1. The belated effort to raise the issue was rejected. The motion to file the supplemental brief was denied by the court of appeals.[2] Therefore, the issue that petitioner seeks to have this Court review was never raised or passed upon by any of the courts below.

Second, Conners was involuntarily admitted to Napa State Hospital because she was committed there by a court appointed conservator after being adjudicated "gravely disabled" within the meaning of California law governing involuntary treatment and placement. Cal. Welf. & Inst. Code §§ 5350-5368. To suggest that a mental patient who has been adjudged by a court to be "gravely disabled" and confined to a state mental hospital was voluntarily committed is absurd.

With respect to the causation issue, which respondent raises in his second "question presented," it is important to note that the court of appeals in fact performed a careful and conscientious review of the trial record: the court reversed the judgment against one of the defendants, Dr. Michael O'Connor, because it found an insufficient nexus to impose liability under 42 U.S.C. § 1983.

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[2] Order Denying Leave to File Supplemental Brief, August 16, 1993.

However, with regard to petitioner, Dr. Thaddeus Kostrubala, the court found substantial evidence of causation:

> The plaintiffs presented substantial evidence that Kostrubala had the ultimate responsibility for the issuance of P-cards [conferring privileges to move about the grounds] to penal code patients, and that Kostrubala was familiar with Duncan and his propensity for violence. The plaintiffs also presented evidence that, approximately two weeks before Conner's death, Kostrubala told the executive director of [Napa State Hospital] that he was surprised that Duncan had a P-card; Kostrubala further stated that he intended to "pull" the card. Moreover, plaintiffs provided expert testimony that supported their claim that Dr. Kostrubala's failure to prevent the reissuance of Duncan's P-card in March 1985 constituted such a substantial departure from accepted professional judgment that it was not based on professional judgment.

Appendix to Petition at 5.

Finally, petitioner's characterization of plaintiffs' success as "limited" (Petition at 5) is deceptive. Plaintiffs obtained, and the court of appeals upheld, a judgment for $280,785 for the death of a mental patient. This is hardly a de minimis or technical victory.

II. REASONS FOR DENYING THE WRIT

Not one of the questions presented by petitioner is appropriate for resolution by this Court. Putting aside the procedural and substantive aspects of the issues presented, the opinion of the court of appeals, upon which the issues rest, is unpublished.[3] Therefore, the opinion does not establish a precedent on any of the issues. Furthermore, because the opinion is unpublished and may not be cited as precedent, it does not produce a conflict with the published decision of any other court.

The first question presented – that is, whether on the facts of decedent's admission to the state hospital she was entitled to safe and secure treatment by state officials – is not ripe for resolution. It was not properly raised in the courts below. "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1975).

Moreover, the circumstances of the decedent's commitment to the mental hospital are virtually indistinguishable from those in *Youngberg v. Romero*, 457 U.S.

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[3] The court of appeals did resolve one issue raised on appeal by published opinion – the issue of the magistrate judge's jurisdiction to award attorneys' fees. But that issue is not raised by the Petition. *Estate of Conners v. O'Connor*, ___ F.3d ___, 1993 U.S. App. Lexis 25098 (9th Cir. Oct. 4, 1993). The remainder of the court of appeals's disposition is in unpublished form. Pursuant to Circuit Rule 36-3 "it shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

307, 309-10 (1982), where the Court held that substantive due process protection does apply. In that case, the plaintiff was committed to a mental institution pursuant to the applicable involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act upon a finding that the plaintiff was "severely retarded and unable to care for himself." In *Youngberg* this Court went on to hold that "When a person is institutionalized – and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist. . . . " 457 U.S. at 317. In this instance, Conners was in a locked unit of the state hospital; she was not free to walk away. Therefore, under *Youngberg*, as well as, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the limitations of Conners's liberty triggered the application of due process protections.

The second question presented – that is, whether Kostrubala was a proximate cause of Conners's death – is nothing more than a plea that this Court review the facts of the case and second guess the jury, the district court, and the court of appeals. Petitioner does not cite any rule of law produced by the court of appeals decision; he cites no conflict with other courts; and, he fails to invoke any necessity for creation of any new rule of nationwide importance. However, by exonerating defendant Michael O'Connor of any liability, the court of appeals showed that it applied a careful and critical application of principles of causation to the facts of this case.

Petitioner's third question – that is, whether the attorneys' fees awarded were proper – simply asks the Court to exercise supervisory powers. Again, no issue

worthy of nationwide resolution is presented. Essentially petitioner complains that an attorneys' fees award of $315,433 violates the principles set out in *Farrar v. Hobby*, ___ U.S. ___, 121 L.Ed. 2d 505 (1993). Petitioner points to no conflict with any other court; he points to no new unsettled issue.[4] In *Farrar* the district court awarded attorneys' fees after the plaintiff received a judgment for one dollar. In this case, plaintiffs obtained a judgment for $280,785. This is hardly de minimis. It is the sort of substantial victory that 42 U.S.C. § 1988 was intended to compensate. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee").

Accordingly, there is no issue raised by petitioner requiring resolution by this Court.

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[4] In an effort to cast respondents in a false light, petitioner states, in a footnote, that "the district court found respondents to have 'padded' their fees." (Quotation in original.) Petition at 16, n 8. Understandably, petitioner fails to cite the record for this quotation. In fact, the district court found nothing of the sort. It simply reduced the fee request by excluding certain time on the ground that it was not reasonably compensable and by reducing the hourly rates of compensation. The court of appeals found that "the record demonstrates that the district court carefully and critically evaluated the fee request, . . . " Appendix to Petition for Writ of Certiorari at 13-14.

III. CONCLUSION

The Petition should be denied.

December 1, 1993

Respectfully submitted,

AMITAI SCHWARTZ*
JOHN HOUSTON SCOTT

* Counsel of Record